OCBC Bank (M) Bhd & Anor v Sin Lee Meng Farm Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D7-22-825 OF 1999
SELVENTHIRANATHAN J
24 JULY 2002

Civil Procedure *— Summary judgment — Hire purchase agreement — Application of O 14 of the Rules of the High Court 1980 — Whether exist default in payment as guarantors — Whether triable issues or valid defence exist to warrant case proceeding to trial — Rules of the High Court 1980 O 14*

Contract *— Breach — Damages — Whether the defendants breached their obligations to pay instalments as and when due — Whether plaintiffs entitled to the balance of the hire purchase price or leasing rentals by way of a claim for damages — Contracts Act 1950 s 75*

Pursuant to two lease agreements and eight hire purchase agreements ('the agreements') entered into between OCBC Finance Bhd, the predecessor company of the plaintiffs, and the first defendant, certain goods and equipment ('the equipment') for use in the first defendant's poultry farming business were leased and/or let and hired out, as the case may be, to the first defendant upon the terms and conditions contained in the agreements. The second to the fifth defendants executed guarantees and indemnities in favour of the plaintiffs whereby they undertook to guarantee the due performance of the terms and conditions of the agreements by the first defendant. The first defendant subsequently defaulted in the payment of sums falling due under the agreements, resulting in their termination of the agreements by the plaintiffs, and via a demand, the plaintiffs claimed for payment of the said sums from the second to the fifth defendants as guarantors. The defendants' failure to so pay led to the filing of the claim herein against each of the defendants followed by the O 14 of the Rules of the High Court 1980 application. The registrar however found that there were triable issues based on the allegations raised by the defendants. Being dissatisfied with his decision, the plaintiffs appealed.

Held, allowing the appeal:

(1) The defendants' allegation that the calculation of their indebtedness after deducting the proceeds of the sale of the equipment from the sums or amounts due was confusing with no evidence to support it. The defendants had also not furnished any evidence of fraud or manifest error in the calculation of the amounts claimed nor put forth any cogent argument as to how or why the calculation was wrong, thereby stripping the allegation of any claim to legitimacy to constitute a triable issue (see pp 262I–263A).

(2) Given the specialized nature of the equipment, that it was second hand and that there was no readily available market, it would appear that the price obtained was the best that the plaintiffs

could have got in the circumstances. Further, reference should be made to the valuation report, which described the condition of the equipment as being extensively vandalized and damaged. The defendants were therefore in no position to complain that the plaintiffs failed to obtain a good price for the equipment since the first defendant itself had failed to keep the equipment in good and serviceable condition, which act was in breach of the agreements, hence adversely affecting the resale value of the equipment (see p 264D–E).

(3) Section 75 of the Contracts Act 1950 was not applicable to the present case as it had been contractually agreed between the parties that the plaintiffs would be entitled to the balance of the hire purchase price or leasing rentals by way of a claim for damages if the defendants breached their obligation to pay the instalments as and when due (see p 267G–H); *Kesang Leasing Sdn Bhd v DB Construction Sdn Bhd & Ors* [1989] 2 CLJ 121 and *Bumiputra Merchant Banker Bhd v The Melewar Corp Bhd & Ors* [1990] 2 CLJ 30 followed.

(4) The defendants sought to raise all and sundry matters as purported issues, regardless of their veracity and lack of bona fides and in this regard, were in fact abusing the process of the court (see p 271A); *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 followed. The defendants had not raised a single triable issue or any valid defence to warrant the present case proceeding to trial (see pp 271A, I–272A).

[Bahasa Malaysia summary

Menurut dua perjanjian pajakan dan lapan perjanjian sewa beli ('perjanjian-perjanjian tersebut') yang diikat di antara OCBC Finance Bhd, syarikat plaintif-plaintif terdahulu, dan defendan pertama, barangan dan peralatan tertentu ('peralatan tersebut') untuk kegunaan dalam perniagaan penternakan ayam itik defendan pertama telah dipajak dan/atau disewa kepada defendan pertama berdasarkan terma-terma dan syarat-syarat yang terkandung dalam perjanjian-perjanjian tersebut. Defendan kedua hingga kelima telah melaksanakan jaminan dan indemniti memihak kepada plaintif-plaintif yang mana mereka mengakujanji untuk menjamin perlaksanaan wajar terma dan syarat perjanjian-perjanjian tersebut oleh defendan pertama. Defendan pertama kemudiannya ingkar dalam bayaran jumlah yang harus dibayar di bawah perjanjian-perjanjian tersebut, yang mengakibatkan penamatan perjanjian-perjanjian tersebut oleh plaintif-plaintif, dan melalui satu tuntutan, plaintif-plaintif menuntut bayaran jumlah tersebut daripada defendan kedua hingga kelima sebagai penjamin-penjamin. Kegagalan defendan-defendan untuk membuat bayaran demikian telah membawa kepada pemfailan tuntutan ini terhadap setiap defendan disusuli dengan permohonan A 14 Kaedah-Kaedah Mahkamah

A Tinggi 1980. Namun demikian, pendaftar mendapati bahawa terdapat isu-isu yang boleh dibicarakan berdasarkan tohmahan-tohmahan yang dibangkitkan oleh defendan-defendan. Plaintif-plaintif yang tidak puas hati dengan keputusan beliau telah merayu.

B **Diputuskan** membenarkan rayuan:

(1) Tohmahan defendan-defendan bahawa pengiraan hutang mereka selepas menolak hasil jualan peralatan daripada jumlah atau amaun yang harus dibayar adalah mengelirukan tanpa keterangan untuk menyokongnya. Defendan-defendan juga tidak mengemukakan apa-apa keterangan ke atas fraud atau kesilapan yang nyata dalam C pengiraan amaun-amaun tersebut mahupun mengemukakan apa-apa hujah yang meyakinkan mengenai bagaimana atau mengapa pengiraan tersebut adalah salah, dengan itu melucutkan pengataan apa-apa tuntutan terhadap perihal sah untuk membentuk isu yang boleh dibicarakan (lihat ms 262I–263A).

D (2) Memandangkan ciri-ciri khusus peralatan tersebut, bahawa ia pernah digunakan dan bahawa tiada pasaran yang sedia ada, ia seolah-olah kelihatan harga yang diperolehi merupakan paling baik yang boleh didapati oleh plaintif-plaintif dalam keadaan demikian. Seterusnya, rujukan haruslah dibuat kepada laporan penilaian, yang menggambarkan keadaan peralatan tersebut E sebagai binasa dan rosak secara teruk. Maka, defendan-defendan tidak berada dalam kedudukan untuk mengadu bahawa plaintif-plaintif telah gagal memperolehi harga baik untuk peralatan tersebut memandangkan defendan pertama telah gagal mengekalkan peralatan tersebut dalam keadaan yang baik dan F boleh diperbaiki, yang mana telah memungkiri perjanjian-perjanjian tersebut, justeru itu menjejaskan harga jualan semula peralatan tersebut (lihat ms 264D–E).

(3) Seksyen 75 Akta Kontrak 1950 tidak terpakai kepada kes ini kerana ia telah dipersetujui melalui kontrak di antara pihak-pihak bahawa plaintif-plaintif akan berhak mendapat baki harga sewa-G beli atau sewa pajakan menerusi tuntutan untuk ganti rugi sekiranya defendan-defendan memungkiri kewajipan untuk membayar ansuran-ansuran yang perlu dibayar (lihat ms 267G–H); *Kesang Leasing Sdn Bhd v DB Construction Sdn Bhd & Ors* [1989] 2 CLJ 121 dan *Bumiputra Merchant Banker Bhd v The Melewar Corp Bhd & Ors* [1990] 2 CLJ 30 diikut. H

(4) Defendan-defendan ingin membangkitkan semua perkara sebagai isu-isu yang dikatakan, tanpa mengendahkan kebenaran mahupun kekurangan bona fide, dan dalam kaitan ini, sebenarnya menyalahgunakan proses mahkamah (lihat ms 271A); *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 diikut. I Defendan-defendan tidak membangkitkan satu isu pun yang perlu dibicarakan atau apa-apa pembelaan sah untuk mewajarkan kes ini untuk dibicarakan (lihat ms 271A, I–272A).]

Notes

For cases on damages for breach of contract, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1986–1999.

For cases on hire purchase agreement, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5955–5961.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (folld)

Bumiputra Merchant Banker Bhd v The Melewar Corporation Bhd & Ors [1990] 2 CLJ 30 (folld)

Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282 (refd)

Credit Corporation (M) Bhd v Bulan Sabit Sdn Bhd & Ors [1989] 2 MLJ 127 (refd)

Hong Leong Finance Bhd v Lee Cheng Heng t/a Lee Cheng Heng Earthworks & Anor [1987] 2 MLJ 226 (refd)

Kesang Leasing Sdn Bhd v DB Construction Sdn Bhd & Ors [1989] 2 CLJ 121 (folld)

Lien Chong Credit & Leasing Sdn Bhd v Sri Saga Holdings Sdn Bhd & Ors [1997] 1 MLJ 367 (refd)

Perbadanan Pembangunan Ekonomi Sarawak v Sarawak Motor Industries Bhd [1989] 3 MLJ 246 (refd)

Pusat Bandar Damansara Sdn Bhd & Anor v Yap Han Soo & Sons Sdn Bhd [2000] 1 MLJ 513 (refd)

South East Asia Insurance Bhd v Kerajaan Malaysia [1998] 1 AMR 657 (refd)

Standard Chartered Bank v Konwah Enterprise Sdn Bhd & Ors [1989] 2 MLJ 474 (refd)

Legislation referred to

Contracts Act 1950 s 75

Rules of the High Court 1980 O 14

Dahlia Lee Wooi Mien (*Shook Lin & Bok*) for the plaintiffs/respondents.

Mathews George (*Danaraj Mathews Jimmy & Sara*) for the defendants/appellants.

Selventhiranathan J: The plaintiffs appealed vide encl (21) to the judge in chambers ('the appeal') against the dismissal by the senior assistant registrar ('the registrar') on the 27 March 2000 of their application for summary judgment against the defendants under O 14 of the Rules of the High Court 1980 ('O 14 application') vide encl (14). However, while the appeal was pending, the first defendant was wound up by an order of the High Court in Malaya at Johor Bahru pursuant to a petition filed by a third party. The first defendant appealed to the Court of Appeal against the winding up order but since that appeal had not been heard and disposed of, the plaintiffs have not withdrawn the present action against the first

defendant but have been holding it in abeyance until the determination of that appeal. However, pending the outcome of that appeal, the appeal in encl (21) was proceeded with against the second to the fifth defendants. In this judgment, any reference to 'the defendants' shall mean a reference to all five defendants or the second to the fifth defendants, as the context may require.

Pursuant to two lease agreements and eight hire purchase agreements (collectively 'the agreements' or separately 'the lease agreements' and 'the hire purchase agreements') entered into between OCBC Finance Bhd, the predecessor company of the plaintiffs, and the first defendant, certain goods and equipment (collectively 'the equipment') for use in the first defendant's poultry farming business were leased and/or let and hired out, as the case may be, to the first defendant upon the terms and conditions contained in the agreements (exhs 'TKJ-4' and 'TKJ-5' to encl (13)). For convenience, references to the plaintiffs hereinafter will encompass the predecessor company where necessary.

The second to the fifth defendants executed guarantees and indemnities ('the guarantees') in favour of the plaintiffs whereby they undertook to guarantee the due performance of the terms and conditions of the agreements by the first defendant (exh 'TKJ-6' to encl (13)).

Unfortunately, the first defendant subsequently defaulted in the payment of sums falling due under the agreements, resulting in their termination by the plaintiffs via exh 'TKJ-7' to encl (13) and a demand for payment of the said sums from the second to the fifth defendants as guarantors via exh 'TKJ-8' to encl (13). The defendants' failure to so pay led to the filing of the claim herein against each of the defendants followed by the O 14 application. The registrar, however, found that there were triable issues based on the allegations raised by the defendants. Being dissatisfied with his decision, the plaintiffs appealed and submitted that the said allegations were unfounded and untenable and ought to have been rejected by the registrar and summary judgment in favour of the plaintiffs should have been entered instead.

When arguing the appeal before me for the first time, the learned counsel for the defendants, Mr Mathews George, conceded that the defendants were in breach of the agreements and stated that the defendants did not know how the various sums claimed by the plaintiffs were arrived at and stated further that the defendants were agreeable to concede this point if the plaintiffs could provide detailed calculations of the same. The learned counsel for the plaintiffs, Ms WM Lee, undertook to provide the calculations within two weeks therefrom, and the court made an order accordingly. Upon Mr Mathews George concluding his submissions, the appeal was adjourned for continuation on another date pending the detailed calculation of the accounts pertaining to the sums claimed, as requested by the defendants.

At the adjourned hearing on 23 January 2001, the plaintiffs were granted an extension of time to put in an affidavit to indicate the current status of the plaintiffs' claim, additionally reflecting the sale of the equipment during the preceding week and the realisation of the proceeds therefrom.

At the subsequent adjourned hearing of the appeal on 9 July 2001, the court was informed that the first defendant had since been wound up and the learned counsel for the plaintiffs requested for time to ascertain the status of the first defendant while informing the court that the plaintiffs were proceeding with their claim against the other defendants. The request was granted.

During the subsequent adjourned hearings of the appeal, the court was informed that the first defendant had appealed to the Court of Appeal against the winding up order that had been made against it and that the plaintiffs would like to maintain the action against the first defendant until that appeal was heard and disposed of but in the meantime they were seeking judgment against the second to the fifth defendants in terms of paras 17 and 18 of encl (26), the latest affidavit which was filed with the detailed and updated calculation of the accounts in question. Accordingly the O 14 application and the amended writ of summons with the statement of claim indorsed thereon were ordered to be amended, without objection from the learned counsel for the defendants.

Fresh written submissions were then ordered on the current state of the O 14 application and this action. After having earlier heard the learned counsel for the parties in submission and having studied the fresh written submissions put in, I allowed the appeal of the plaintiffs in encl (21) with costs by setting aside the order of the registrar in respect of the O 14 application in encl (14) and substituting therefor an order in terms of encl (32) (ie the O 14 application in encl (14) as amended) against the second to the fifth defendants. My reasons for so doing now follow.

I found the defendants' allegation that the calculation of their indebtedness after deducting the proceeds of the sale of the equipment from the sums or amounts due was confusing to be a bare statement with no evidence to support it. I agreed with the learned counsel for the plaintiffs that the full particulars of the current outstanding amounts, after due credit had been given, to be comprehensively and clearly set out in paras 24 and 25 of the plaintiffs' re-amended statement of claim in encl (31) and that the updated statements of account of the final amounts outstanding under each of the hire purchase and lease-agreement accounts were also produced as exhs 'TKJ-18' and TKJ-19' to encl (26), ie the plaintiffs' second supplementary affidavit, which was filed by consent of the parties. Further, the amounts owing had also been verified under oath in the plaintiffs' affidavits and by certificates of indebtedness exhibited as 'TKJ-9' to encl (13) which, by virtue of the standard form cl 2 in the various guarantees, became conclusive evidence of the debt in the absence of manifest error or fraud (see *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363).

The defendants, on the other hand, had not furnished any evidence of fraud or manifest error in the calculation of the amounts claimed nor put forth any cogent argument as to how or why the calculation was wrong, thereby stripping the allegation of any claim to legitimacy to constitute a triable issue (see *Lien Chong Credit & Leasing Sdn Bhd v Sri Saga Holdings*

Sdn Bhd & Ors [1997] 1 MLJ 367, *Perbadanan Pembangunan Ekonomi Sarawak v Sarawak Motor Industries Bhd* [1989] 3 MLJ 246, and *Standard Chartered Bank v Konwah Enterprise Sdn Bhd & Ors* [1989] 2 MLJ 474).

Although during the course of arguments on 3 October 2000, Mr Mathews George had been prepared to concede that the amounts claimed were correct if the plaintiffs were able to provide detailed calculations as to how they were arrived at, yet he appears to have resiled from this position in his final submissions by taking a blunderbuss approach in arguing the appeal by relying 'on all submissions [made] so far' at the continued hearing on the 23 August 2001 and further reiterating them in his final written submissions.

I was also hard put to separate the wheat from the chaff in the submissions made on the defendants' behalf because of the blunderbuss approach adverted to earlier. Understandably, the learned counsel for the plaintiffs was faced with the same dilemma and she accordingly responded piecemeal to the arguments raised on behalf of the defendants.

In the final written submissions on behalf of the defendants, Mr Mathews George questioned whether the price obtained from the sale of the equipment was reasonable in the circumstances of the case, the plaintiffs having sold all the equipment under the lease and hire purchase agreements for the sum of RM150,000. He took as examples one set of equipment each under the lease and hire purchase agreements and argued that 'it would be apparent that the equipments [sic] were sold at a grossly low price'.

Under one lease agreement, he referred to exh 'TKJ-4' to encl (13) from pp 79 to 93, in particular at p 90, wherein the agreed loss value of that specific equipment on the fifth year was given as RM67,006.08. He also referred to a hire purchase agreement at pp 131 to 149 in exh 'TKJ-5' to encl (13), in particular at p 147 therein, where the price of that specific equipment was given as RM350,297.38.

He therefore argued that 'even with the two examples referred above the value of the goods (meaning the equipment) far exceeds the sum of RM150,000.00', and that 'the disparity would be even more apparent if the prices of the remaining lease and hire purchase agreements are taken into account'.

He contended that 'there was no mention as to whether the equipment was sold via a public or private auction and the procedure adopted for the said sale. The defendants were also not at any time informed about the offer price from the purchaser. Had this been done, it would have been reasonable to expect the defendants to object to the grossly low sale price. The defendants could have possibly opted to purchase the equipments [sic] themselves or even procure [sic] their own purchaser for a better disposal price so as to reduce the sum owing to the plaintiffs', and that 'the letter from the plaintiffs' solicitors to the defendants' solicitors of the offer from the purchaser (ie exh 'TKJ-17' to encl (26)) is nothing more than a letter informing the defendants about the said sale'. He relied on the case of *Hong Leong Finance Bhd v Lee Cheng Heng t/a Lee Cheng Heng Earthworks & Anor*

[1987] 2 MLJ 226 to contend that as the equipment was ostensibly sold at below the market price, this was unfair to the defendants which resulted in their having raised a triable issue.

The plaintiffs' answer to this alleged triable issue was that the defendants had yet again raised bare and unsubstantiated allegations as all the equipment under the agreements had been sold at a fair price based on the valuation provided by an independent firm of valuers, namely Messrs Jones Lang Wootton, and that the actual sale price of the equipment at RM150,000 was in fact more than the valuation of RM148,000 stated in the valuation report exhibited as 'TKJ-20' to encl (29).

I agreed with the plaintiffs' submission that that valuation report which was prepared by an independent valuer put paid to the allegation that the price obtained was too low, more so when no evidence was forthcoming from the defendants to support the allegation that the equipment could have fetched a better price. Given the specialized nature of the equipment, that it was second-hand and that there was no readily available market, it would appear that the price obtained was the best that the plaintiffs could have got in the circumstances. Further, reference should be made to p 3 of the valuation report (p 6 of exh 'TKJ-20' to encl (29)) which described the condition of the equipment as being extensively vandalized and damaged. The defendants were therefore in no position to complain that the plaintiffs failed to obtain a good price for the equipment since the first defendant itself had failed to keep the equipment in good and serviceable condition, which act was in breach of cl 6 of the hire purchase agreements and cl 8 of the lease agreements, hence adversely affecting the resale value of the equipment.

As there was no provision in any of the agreements specifying the procedure to be adopted in the event of the sale of the equipment, I found that the procedure adopted by the plaintiffs was not unreasonable. Accordingly, the allegation that the procedure adopted was not proper was made without any basis and was accordingly rejected.

Further, the defendants were informed of the sale of the equipment as they had in fact admitted having received the letter dated 22 December 2000 from the plaintiffs' solicitors to their solicitors (exh 'TKJ-17' to encl (26)) informing them of the offer from the purchaser at the material time. The defendants did not object to the offer then and are accordingly estopped from subsequently questioning the procedure adopted for the sale or the acceptance of the offer by the plaintiffs as the sale was concluded consequent to their silence or failure to protest.

Had the defendants truly wanted to object to the sale price, they could have done so before the sale was concluded on 12 January 2001, which was when the purchase price was fully paid (see the letter from the purchaser to the plaintiffs exhibited as 'TKJ-16' to encl (26)). Further, no letter of complaint about the sale price was ever received by the plaintiffs and none was exhibited in the affidavits of the defendants. As the complaint was only first raised in these proceedings, it is bereft of bona fides meriting any iota of consideration.

I also agreed with the plaintiffs' submission that the defendants' further contention that had they known about the low sale price earlier, they could have either purchased the equipment themselves or even procured their own purchaser was unmeritorious given the fact that the equipment was left to rot by the first defendant itself and that no one among the defendants had approached the plaintiffs nor made any attempts to purchase the equipment or brought buyers therefor despite there being ample time for the defendants to buy the equipment if they had wanted to do so.

In relation to the examples cited by Mr Mathews George to contend that the price obtained for the equipment upon its sale was not reasonable, the plaintiffs' reply was that 'the actual facts and truth of the matter had not been disclosed' in the defendants' submissions because, under the lease agreements, the equipment was sold in the sixth year of the agreements and the agreed loss value for the sixth year was zero (as seen in item (9) of the schedule to the lease agreement, namely, exh 'TKJ-4' to encl (13)) and that the agreed loss value of the equipment as set out in the defendants' submissions for the fifth year was not applicable, and hence it was misleading and wrong to refer to the same. This reply of the plaintiffs found favour with the court.

As for the equipment under the hire purchase agreements, the plaintiffs' acceptable reply was that the price quoted in the defendants' submission was the cash price of the equipment at the inception of the agreements, and that it was 'totally ludicrous for the defendants to say that the value of the equipment by now [that is the sixth year] was still the same, after taking into account wear and tear, and more importantly, the poor state of the equipment. The defendants had breached their contractual obligation to the plaintiffs to keep the equipment in a good and serviceable condition (see cl 6 in exh 'TKJ-5' and cl 8 in exh 'TKJ-4' to encl (13)) and it is highly inequitable to come to court and cry foul about the resale price of the equipment.

I agreed with the above submissions on behalf of the plaintiffs and further agreed that the poor state of repair of the equipment was a real limitation to its sale and accordingly the defendants were in no position to complain now that the sale price of the equipment was low. The case of *Hong Leong Finance Bhd* referred to on behalf of the defendants is distinguishable from the present case as the plaintiffs in that case had not disclosed the market value of the subject-matter vehicle, which clearly was not the case here. In the present case, the plaintiffs exhibited the valuation report given by the independent valuer (see 'TKJ-20' to encl (29)) and had shown that the actual sale price of the equipment was in fact slightly above the valuation price. Therefore, the principle enunciated in *Hong Leong Finance Bhd* cannot be applied to the present case.

The defendants also sought to raise as a triable issue the purported delay in the sale of the equipment by the plaintiffs, contending that the plaintiffs had failed to disclose when the equipment was repossessed, and that 'the plaintiffs' vigorous stand at all material time were [sic] that they were under no obligation to repossess the equipment'. Here, Mr Mathews

George referred to the case of *Credit Corporation (M) Bhd v Bulan Sabit Sdn Bhd & Ors* [1989] 2 MLJ 127 where Shankar J (as he then was) held as follows at p 128 of the report of that case: A

> ... The long delay between the date of repossession and the date of the sale did raise a question as to whether the plaintiffs had been prudent in the measures they adopted for the disposal of the goods. They have a duty to mitigate and they must show that they did so. B

Mr Mathews George also relied on a passage in *Hong Leong Finance Bhd* where Yusoff Mohamed J (as he then was) stated as follows:

> The defendants, in my opinion, are entitled to mitigate damages allegedly due from them. Having done this on behalf of the defendants, the plaintiffs are C duty bound to act reasonably and responsibly and are actionable at the instance of the defendants.

The plaintiffs' reply, which the court accepted, was that this argument of the defendants was untenable as the equipment (being customized for the use of the first defendant's chicken farming business) remained in the first D defendant's premises at all material times until its sale, whereby 'the defendants were at all times free to dispose of the equipment at will and had not' and therefore 'their allegation is no more than a ruse and intended to mislead'. It was submitted that the plaintiffs did not repossess the equipment and had no obligation to do so under the terms of the agreements, and that in lieu of repossession the plaintiffs were entitled to E claim outstanding rentals and instalments due as damages. In the circumstances, the question of delay did not arise. In fact, if the defendants had wished the plaintiffs to sell the equipment earlier, the first defendant could and should have delivered up possession of the equipment or surrendered the same to the plaintiffs, which the first defendant was obliged to do under cl 23 of the lease agreements and cl 15.2 of the hire purchase F agreements but the first defendant did not do so.

Reference was made to the decision of the Federal Court in the case of *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 wherein it was held that a party could contract out of a provision in the Contracts Act 1950 ('the Act') enacted for its protection and having done so was in no position G to complain of the same later. It was therefore submitted for the plaintiffs that the first defendant and the second to the fifth defendants were bound by the terms of the agreements and accordingly could not later raise the complaint which they raised.

It was further argued that in any event, the defendants were approbating and reprobating on this matter by complaining on the one hand H of the sale of the equipment by the plaintiffs and saying that the defendants could have got a better price for it, and yet, on the other hand, saying that the plaintiffs did not repossess and sell it earlier as they should have.

In addition, under the lease agreements, the plaintiffs were at all times the true owners of the equipment and were merely leasing the same to the I first defendant for its use. In this context, there was no question of repossession and sale of the equipment and accounting for the proceeds of

A the sale to the first defendant. Reference was made to the decision of the Federal Court in the case of *Credit Corporation (Malaysia) Bhd v KM Basheer Ahamed & Anor* [1985] 1 MLJ 208 in support of this argument. It was further asserted that the terms of the lease agreements stipulated for payment of the balance rentals by the first defendant, by which terms the first defendant was bound. Notwithstanding that, the first defendant's
B accounts were credited with the net proceeds of sale.

The plaintiffs submitted that the principle in the case of *Credit Corporation (M) Bhd v Bulan Sabit Sdn Bhd & Ors* cited by the defendants was inapplicable as the facts in that case and those in the present case were completely different and hence distinguishable. In the present case, the
C equipment was at all times in the first defendant's possession until its sale. Further, the agreements entitled the plaintiffs to mount a claim for the total outstanding rentals against the defendants in lieu of repossession which entitlement was exercised by the plaintiffs in filing the claim herein. Such right did not appear to be available in *Credit Corporation (M) Bhd v Bulan Sabit Sdn Bhd & Ors* as the hire purchase item in that case was a motor vehicle
D which was repossessed and its sale eventually took place after a long delay. There was therefore no question of delay being an issue in the present case.

Under the terms of the hire purchase agreements, the plaintiffs were given a right to claim for damages in lieu of repossession. This term was necessary in the present case because of, as stated earlier, the specialised
E nature of the equipment which was customised to meet the needs of the first defendant's business of chicken farming. By so contracting, the first defendant could not later complain that the plaintiffs should have but did not repossess the equipment and consequentially neither could the second to the fifth defendants do so.

F The defendant also contended that the terms of the agreements which gave the plaintiffs a right to sue for all that they had sued in the present case were being oppressive by way of a penalty and offended s 75 of the Act, and argued that in the case of *Credit Corporation (M) Bhd v Bulan Sabit Sdn Bhd & Ors*, the learned judge had held that there was a triable issue as to what reasonable compensation the plaintiffs were entitled to by way of damages.

G The plaintiffs replied that this was a new issue raised by the defendants, which in any event was baseless and appeared to be made as an afterthought.

With respect, I agree that s 75 of the Act was not applicable to the present case as it had been contractually agreed between the parties that the
H plaintiffs would be entitled to the balance hire purchase price or leasing rentals by way of a claim for damages if the defendants breached their obligation to pay the instalments as and when due. The sums claimed by the plaintiffs were computed in accordance with cl 18 of the lease agreements and cl 10 of the hire purchase agreements. As the amounts demanded were outstanding and late charges were agreed by the first defendant to be
I payable in such circumstances, there was no question of s 75 of the Act being applicable in the present case (see *Kesang Leasing Sdn Bhd v DB Construction Sdn Bhd & Three Ors* [1989] 2 CLJ 121, and *Bumiputra*

Merchant Banker Bhd v The Melewar Corporation Bhd & Two Ors [1990] 2 CLJ 30). A

In this regard, reference may be made to the decision of the Court of Appeal in *Pusat Bandar Damansara Sdn Bhd & Anor v Yap Han Soo & Sons Sdn Bhd* [2000] 1 MLJ 513 wherein, speaking for the Court of Appeal, Siti Norma JCA (as she then was) held at p 524 of the report of that case as follows: B

> To bring that increased or penalty interest within the ambit of s 75, it must first be shown that it was excessive in nature. The fact that it was an agreed penalty interest as opposed to one that was fixed unilaterally by the appellants lends support to my conclusion that it could not have been that excessive to enable the respondent to agree to that rate of interest to be charged. On that C reasoning the respondent cannot now be heard to complain that the rate of 19% pa on all instalments due as at 30 June 1990 is excessive and under those circumstances that rate of interest cannot be caught by s 75.
>
> I am aware that the 'Explanation' to s 75 prescribes such a promise to pay increased interest to be a penalty but I hasten to add that the language used in the 'Explanation' is not mandatory in nature as the Legislature preferred the D word 'may' as opposed to 'shall'. Under such circumstances I consider that every promise to pay increased interest has to be identified and evaluated before a determination can be reached whether such a promise falls within the situation as envisaged by the 'Explanation' in s 75.'

Similarly, in the present case, the terms of the agreements had to be given effect to as there was nothing to suggest that the plaintiffs took any undue E advantage over the defendants in entering into the agreements.

The defendants contended further that the 'plaintiffs' claim was also ambiguous and uncertain for the following reasons:

(a) whether the defendants' prepaid instalments and final instalments were taken into account in the plaintiffs' final claim; F

(b) calculation of late payment interest;

(c) whether rebate was taken into account before the final claim was made as the plaintiffs ought to have taken into account rebate as the claim was analogous to full settlement;

(d) no periodic statement of account was exhibited or sent to show the sum G owing from time to time,

and submitted that the second to the fifth defendants needed only to show one triable issue to warrant the dismissal of the plaintiffs' O 14 application and that the defendants had satisfied that onus on the basis of the Court of Appeal decision in *South East Asia Insurance Bhd v Kerajaan Malaysia* H [1998] 1 AMR 657, and accordingly prayed that the plaintiffs' appeal be dismissed with costs.

On question (a) in the foregoing paragraph, the allegation was that the amounts currently outstanding appear to be higher than they were before the equipment was sold. However, as explained in the plaintiffs' affidavit in reply at encl (29), the reason that the amounts currently outstanding were I so higher was that interests had further accrued from the time of the demand to the date of disposal of the equipment, over a total period of more

A than two years. In addition, the amount realized from the sale of the equipment was insufficient to meet all sums due under the various accounts. As such, not all accounts were settled and some were accumulating interest. Interest charged on the late payments were part of the contractual terms in cl 10 of the hire purchase agreements and item (10) in the schedule to the lease agreements, and they had been charged B accordingly. Hence, the current amounts claimed would be higher than at the time the writ was issued against the defendants.

At any rate the question whether the defendants' prepaid instalments and final instalments were taken into account in the plaintiffs' final claim was a question of fact which should have been raised by way of affidavit by C the defendants to enable the plaintiffs to reply effectively thereto. This was not done and as it was only raised by the defendants' counsel in submission, it was disregarded by the court. In any event, the plaintiffs had taken into account prepaid instalments in arriving at the net outstanding balance as seen in the statements of accounts exhibited as 'TKJ-18' and 'TKJ-19' to encl (26) and therefore the question raised was a non-issue.

D Similarly, question (b) above was merely posed as 'calculation of late payment interest' without more and with nothing to support it. It was accordingly dismissed as not raising any triable issue.

On question (c) above, ie whether rebate was taken into account, the allegation was that the amounts claimed were excessive because the E plaintiffs failed to take into account rebate which the defendants were allegedly entitled to, in computing the amounts outstanding.

With respect, this allegation was again misconceived because cl 13 of the hire purchase agreements allowed rebate on the sum payable only if the first defendant fully settled the amounts in the agreements by paying the F balance of the hire purchase price and leasing rental at any time before the expiry of the original tenure of the agreements. Not only did the defendants not offer any early settlement to attract rebate, the first defendant in fact instead defaulted in payment of the amounts due, thereby incurring default interest on the amounts outstanding. Therefore there was no question of any rebate being given and this purported issue was again a sham. The G submission that the plaintiffs' claim herein was 'analogous to full settlement' was misconceived as the filing of the statement of claim herein by the plaintiffs could not be tantamount to receiving payment for the debts due. The various amounts under the agreements remain due and owing to date, which the defendants could not and have not denied.

H Finally, the contention in question (d) above that no periodic statement of account was exhibited or sent to show the sum owing from time to time was again a sham as the said documents were exhibited as 'TKJ-13' to encl (26). The statements of account were clearly sent periodically.

In addition to the foregoing, the defendants had, in the proceedings before the registrar, raised various minor issues which, to my mind, I reflected the blunderbuss approach taken by the defendants in meeting the O 14 application of the plaintiffs. I consider these minor issues to be totally without merit and reproduce below a summary of them and the plaintiffs'

reply thereto in the hearing of the appeal before me to show their spurious nature with my exhortation that intending litigants will take note of what is stated here so as not to unnecessarily waste precious judicial time which is at a premium in the courts today:

> Finally, the plaintiffs will summarily deal with the minor issues previously raised by the defendants at the summary-judgment stage before the registrar and append our reply herein so as to be totally comprehensive.

'Issues' raised by defendants	Plaintiff's reply
1 The plaintiffs' solicitors are precluded from representing the plaintiffs as the hire purchase agreements were prepared by them	1 These are standard agreements not prepared by the plaintiffs' solicitors in the action herein and no dispute has arisen as to the validity of the terms in the contract. This issue is a sham.
2 The agreements were not dated when signed nor (were they) witnessed	2 The agreements are dated and there is no requirement for them to be witnessed. This issue is a sham.
3 The plaintiffs did not sign the agreements	3 The agreements were signed on behalf of the plaintiffs by their authorized officer. This issue is a sham.
4 The agreements and the guarantees were not sent to the defendants	4 The documents had been sent to the defendants (refer exh 'TKJ-11' to encl (20A)). This issue is a sham.
5 The particulars were not filled in when the documents were signed	5 The agreements are in a standard form with all material terms printed and the defendants signed them and hence are bound thereby. Only the particulars relating to the details of the equipment were filled in later. Pursuant to the agreements, the equipment described therein was delivered to the first defendant without objection. This issue is a sham.
6 No demand or notice of demand was served on the defendants	6 The demands were properly served on all the defendants and proof of service has been produced (refer to exhs 'TKJ-7' and 'TKJ-8' to encl (13)). This issue is a sham.
7 No notice of change of interest rate was given	7 There was no change of interest rate and the interest rate for each agreement was fixed and never varied (see cl 18 of the lease agreements and cl 10 of the hire purchase agreements, particularized in para 21 of encl (13)). This issue is a sham.

In arriving at my decision in the appeal, it became crystal clear to me that the defendants sought to raise all and sundry matters as purported issues, regardless of their veracity and lack of bona fides and in this regard were in fact abusing the process of the court. In so arriving at my decision, I applied the salutary principles of law enunciated for this purpose in the decision of the Supreme Court in the case of *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 where Mohamed Azmi SCJ (as he then was), speaking for the majority of the Supreme Court, held as follows at p 408 of the report of that case:

> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. *Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable.* This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.
>
> Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand (see *Cow v Casey* [1949] 1 All ER 197 and *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508 at p 516). (Emphasis added.)

The above pronouncement by the majority of the apex court in the country must be accepted as a correct enunciation of the law binding on all other courts until and unless the present successor Federal Court determines otherwise. In this regard, the minority opinion of Gunn Chit Tuan SCJ (as he then was) at pp 411 to 415 of the report of that case remains an opinion and it cannot under any circumstances be held out to be a statement of the applicable law as mistakenly sought to be made out at times to be the case by counsel espousing the approach expressed in the minority opinion.

Although Mr Mathews George by his final written submissions sought to persuade the court to rely on the Court of Appeal decision in *South East Asia Insurance Bhd* to support his contention that there were triable issues in the present case as well which rendered it not fit and proper wherein to order summary judgment, he unfortunately overlooked the fact that that decision of the Court of Appeal was reversed by the Federal Court upon appeal vide *Government of Malaysia v South East Asia Insurance Bhd* [2000] 3 MLJ 625, and *Kerajaan Malaysia v South East Asia Insurance Bhd* [2000] 3 AMR 2803 (also reported in [2000] 3 CLJ 705), whereby the Federal Court held that there were no triable issues in that case.

For all the foregoing reasons, I agreed with the plaintiffs' submissions that the second to the fifth defendants had not raised a single triable issue

or any valid defence to warrant the present case proceeding to trial, thereby necessitating the calling of witnesses to adduce viva voce evidence in elaboration of such issue or defence. In the circumstances, the plaintiffs' appeal was allowed with costs, the registrar's order in respect of encl (14) was set aside and summary judgment was ordered to be entered against the second to the fifth defendants in terms of the O 14 application as amended in encl (32).

Appeal allowed.

Reported by Peter Ling